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82-754

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1982

Case No.

STATE OF FLORIDA,

Petitioner

v.

DANIEL LOWELL COLER,

Respondent.

Petition for Writ of
Certiorari to the
Supreme Court of Florida.

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QUESTION PRESENTED

I.

WHETHER, ON DECIDING THAT THE IMPOSITION OF THE DEATH PENALTY FOR "CHILD RAPE" IS CONSTITUTIONALLY INFIRM, THE FLORIDA SUPREME COURT DECIDED AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE DECIDED ONLY BY THIS COURT.

1) WHETHER THE STATE OF FLORIDA WILL BE PRECLUDED FROM PRESENTING THIS ISSUE TO THIS COURT IN THE FUTURE, THUS MAKING REVIEW IN THIS INSTANCE ESSENTIAL.

2) WHETHER THE STATE OF MISSISSIPPI WILL ALSO BE ADVERSELY AFFECTED IF THE ISSUE PRESENTED IS NOT HEARD BY THIS COURT.

3) WHETHER THE STATE OF FLORIDA, IN AN ATTEMPT TO PROTECT CHILDREN FROM SEXUAL EXPLOITATION, MAY IMPOSE THE DEATH PENALTY FOR CHILD RAPE IN THE EXERCISE OF THOSE POWERS RESERVED TO THE STATES, WITHOUT VIOLATING THE CONSTITUTIONAL PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

II.

WHETHER THE FLORIDA SUPREME COURT HAS DECIDED A QUESTION IN A WAY WHICH CONFLICTS WITH A DECISION OF THE SUPREME COURT OF MISSISSIPPI.

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OTHER AUTHORITIES

28 U.S.C. §1257(3)	1
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The opinion of the Supreme Court of Florida is as of this date unreported, but appears in the appendix hereto as (A-1-27).

JURISDICTIONAL STATEMENT

The Florida Supreme Court entered its judgment on May 13, 1982 (A-1-25). On August 31, 1982, it denied a timely filed petition for rehearing. (A-26) The Court's jurisdiction is invoked under 28 U.S.C. §1257(3) in that the Supreme Court of Florida is the highest court in the State of Florida in which a decision could be had and in its decision in the instant case it held a state statute unconstitutional on the grounds that it was repugnant to the Constitution of the United States; viz.: that so much of Section 794.011(2)

Florida Statutes (1977), which provides that whoever being eighteen years or older commits a sexual battery upon a person eleven years or younger, is guilty of a capital felony, punishable under Florida Statute 775.082, by death, violates the Eighth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides:

AMENDMENT VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FLORIDA STATUTE INVOLVED

Florida Statute 794.011 (1977) appears in (A-46-51). Section (2) thereof reads:

> (2) A person 18 years of age or older who commits sexual battery upon, or injures the sexual organs of, a person 11 years of age or younger in an attempt to commit sexual battery upon said person

commits a capital felony punishable in ss. 775.082 and 921.121. If the offender is under the age of 18, that person shall be guilty of a life felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

STATEMENT OF THE CASE

Respondent was charged in a four count indictment with three counts of rape in violation of Section 794.01(1), Florida Statutes (1973), and one count of sexual battery in violation of Section 794.011(2), Florida Statutes (1975).

He filed a motion to dismiss the indictment on November 17, 1977, alleging inter alia, that the imposition of the death penalty for sexual battery violated the cruel and unusual punishment clause of the Eighth Amendment. The motion was denied.

At trial it was established that the victim Mary Danielle Coler was sexually battered by her father, respondent, "once

or twice" a week for a period of several years. The four counts included three counts for rape: on December 25, 1972 (victim 7 years old); between January 23, 1973 and June 1, 1973 (victim 7 years old); lastly between June 1, 1974 and September 1974 (victim 8 or 9). The sexual battery occurred between January 1, 1977 and March 31, 1977 (victim 11 years old).

Respondent was convicted on all four counts. He was sentenced to death for each of the four counts. The trial court based its sentence of death for the sexual battery on the finding that the sexual battery was committed in an <u>especially</u> heinous, atrocious or cruel manner. The trial court found that no mitigating circumstances existed.

On appeal the Florida Supreme Court vacated the death penalty on the ground that the sentence of death is grossly dis-

proportionate and excessive punishment for the crime of sexual assault and therefore forbidden by the Eighth Amendment of the United States Constitution as cruel and unusual punishment.

REASONS FOR GRANTING THE WRIT

I. THE FLORIDA SUPREME COURT DECIDED AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED ONLY BY THIS COURT.

In Coker v. Georgia, 433 U.S. 584 (1977) the Court held that the imposition of the death penalty for the rape of an adult woman violated the Eighth Amendment. Left unanswered was whether imposition of the death penalty for "child rape" also violates the Eighth Amendment.

The Florida Supreme Court answered the question in the affirmative stating that ". . . a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and therefore

forbidden by the eighth amendment as cruel and unusual punishment." (A-1)

Thus, the Florida Supreme Court decided the question squarely and exclusively on federal constitutional grounds. There are several reasons why the question decided by the Florida Supreme Court is an important one which should be decided by this Court:

1. Unless the Court grants certiorari review in this case, the State of Florida will thereafter be effectively precluded from presenting this issue to the Court again. Subsequent cases involving the imposition of the death penalty under Florida's sexual battery statute will never reach this maturity. Only in cases in which the sentencing authority imposes the sentence of death could the issue arise. But, trial judges, in compliance with the Florida Supreme Court's decision, will never again impose the sentence of death

for the sexual battery of a child eleven years of age or younger.

2. A decision by the Court is not only important to the State of Florida and to the State of Mississippi which also has a statute imposing the sentence of death for "child rape,"[1]; but even more, to other states which may be desirous of enacting similar statutes and which may have hesitated because of the Court's deicison in Coker and the confusion which was generated by Furman v. Georgia, 408 U.S. 238 (1972).

[1]/Upshaw v. State, 350 So.2d 1358 (Miss. 1977); Coker v. Georgia, 433 U.S. 584, 595 (1977).

3. The plurality in Coker seemed to feel that since the death sentence for rape of an adult woman was a disproportionate punishment, an inquiry as to whether it served the legitimate ends of punishment was an invalid consideration (footnote 4, plurality opinion, Justice White). But "child rape" is unquestionably more outrageous. Its affects may be more traumatic and lasting, not only to the child, but the entire family and society. The Court has recognized that states do have an interest in protecting the welfare of children. Ginsberg v. New York, 390 U.S. 629 (1968). The form or degree of that protection is primarily a legislative function, Gore v. U.S., 357, 386, 393 (1958), which may, constitutionally, vary from state to state according to each state's varying needs and views. Rummel v.

Estelle, 455 U.S. 263, 282 (1980). Only when a punishment is so grossly disproportionate to the crime under all circumstances can it be said that the legislature has exceeded its prerogative. Thus it is important for the Court to decide whether - regardless of the circumstances of the crime or the character of the accused - the sentence of death for "child rape" is so grossly disproportionate that it outweighs any legitimate end of punishment.

This Court has recently recognized the states' legitimate interest in protecting the physical and psychological well-being of minors. New York v. Ferber, ____ U.S. ___, 73 L.Ed.2d 1113 (1982). This Court elaborated on this theme in Ferber and stated:

> The prevention of sexual exploitation and abuse of children constitutes a government objective of

surpassing importance.

Ferber at 1123.

In Ferber, this Court declined to second guess the legislative judgment inherent in the New York law prohibiting "child pornography." Florida is no less entitled to its statute which attempts to prevent the sexual battery of children by imposing the harshest penalty. If this Court genuinely feels that children are entitled to special protection from sexual exploitation, then the question presented by petitioner herein should be reviewed.

II. THE SUPREME COURT OF FLORIDA HAS DECIDED THE QUESTION IN A WAY WHICH CONFLICTS WITH A DECISION OF THE SUPREME COURT OF MISSISSIPPI.

In Upshaw v. State, 350 So.2d 1358, 1360 (Miss. 1977) the Supreme Court of Mississippi squarely rejected the contention that Coker precluded the imposi-

tion of the death penalty for ". . . rape of a female child under the age of twelve years. . ." In doing so, the Mississippi Supreme Court observed that this Court took great pains to limit its decision to the rape of an adult woman; that "at least six other times the majority opinion referred to the rape of an 'adult woman'." Manifestly, the decision of the Supreme Court of Florida in the instant case is in direct conflict with the decision in Upshaw. Upshaw holds that the death penalty for the rape of a female child under the age of 12 years of age is not grossly disproportionate to the crime; whereas the decision of the Florida Supreme Court in the instant case holds that it is, regardless the circumstances surrounding its commission.

The decisions of the Florida Supreme Court and of the Supreme Court of Missis-

sippi are irreconcilable. This irreconcilable conflict involving the Eighth Amendment is one that needs to be resolved by this Court. The Florida Supreme Court is not supreme on federal constitutional questions. That is the prerogative of this Court. Unless the court grants certiorari review the Florida Supreme Court will, in essence, become this court's uninvited surrogate on a matter involving an important federal constitutional question.

CONCLUSION

For these reasons, petitioner respectfully urges this Court to grant certiorari and reverse the holding of the Supreme Court of the State of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Petition for Writ of Certiorari to Mr. Tyrie A. Boyer, 3030 Independent Life Building, One Independent Dr., Jacksonville 32202, and to Ms. Melanie Hines, Assistant Public Defender, P. O. Box 671, Tallahassee, Florida 32302, counsel for Respondent, by U.S. Mail, this day of October, 1982.

GREGORY C. SMITH
Assistant Attorney General
of Counsel